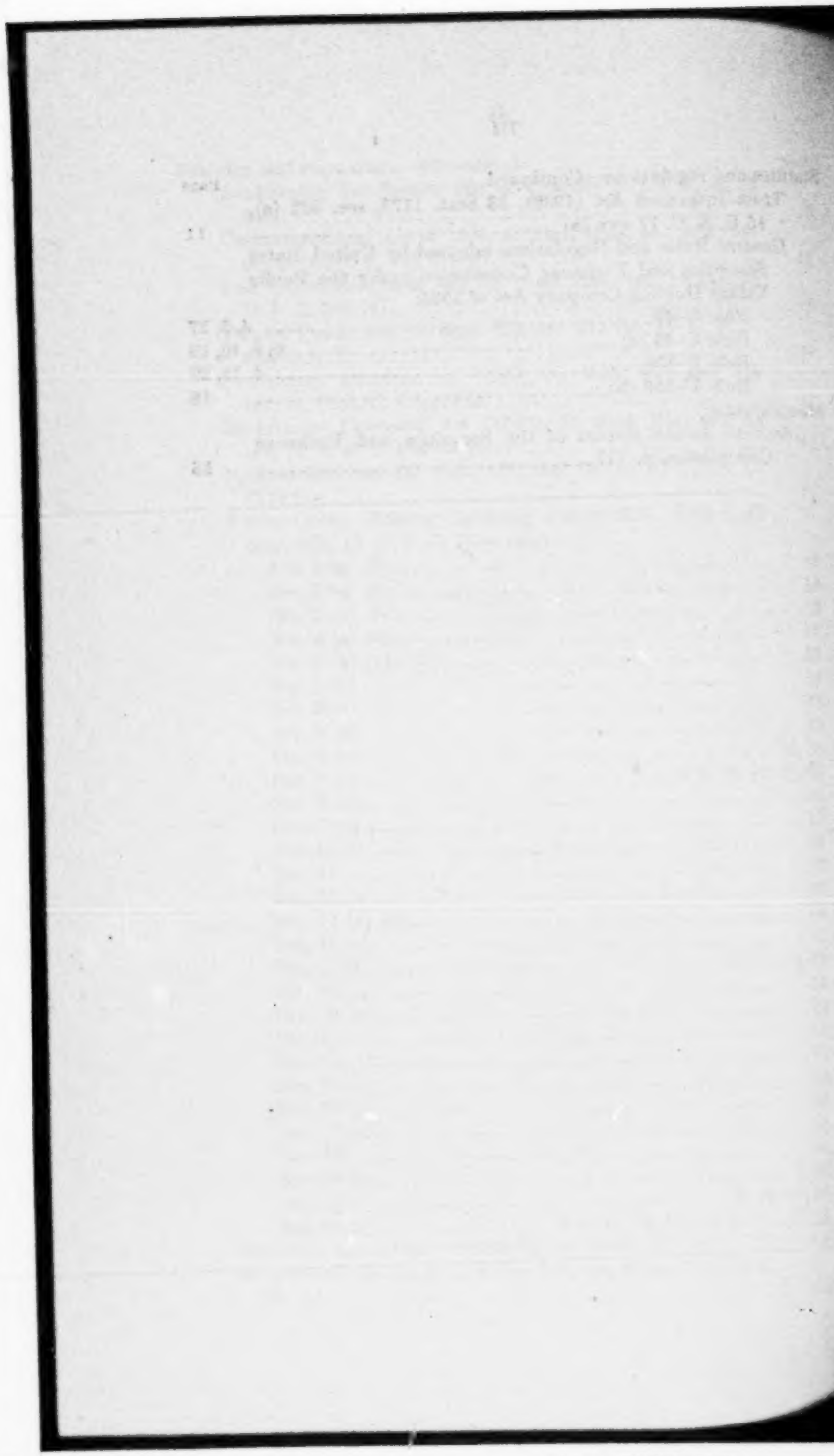
INDEX

CITATIONS



In the Supreme Court of the United States

OCTOBER TERM, 1947

No. —

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

PHILADELPHIA COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Solicitor General, on behalf of the Securities and Exchange Commission, prays that a writ of certiorari be issued to review the orders of the United States Court of Appeals for the District of Columbia entered October 8, 1947, and November 4, 1947. (R. 231, 290.)

OPINIONS BELOW

The opinion of the Court of Appeals (R. 199–231) has not yet been officially reported. The memorandum of views of the Commission, which accompanied its action of February 28, 1947 (R. 111–131), is reported in S. E. C. Holding Company Act Release No. 7237–A.

JURISDICTION

The orders of the Court of Appeals were entered respectively October 8, 1947, and November 4, 1947 (R. 231, 290). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended, which is made applicable by Section 24 (a) of the Public Utility Holding Company Act of 1935.

QUESTIONS PRESENTED

1. Does the express provision for review only of "an order issued by the Commission" permit review thereunder of quasi-legislative action promulgating a "rule or regulation" or amendment thereto?

2. Does what purports to be a rule, promulgated in general terms on the basis of the Commission's experience—without a factual hearing and pursuant to a grant of authority to act only by "rule or regulation"—becomes an "adjudication" for purposes of Section 24 jurisdiction merely because the rule affects a limited number of persons?

3. Does the promulgation of an amendment to an exemption rule narrowing the scope of the exemption accorded as a matter of discretion by the earlier rule threaten such irreparable injury as would warrant judicial relief where under the applicable provisions of the Holding Company Act the only practical consequence of the amendatory action, if valid, is to subject proposed trans-

actions, including a plan of reorganization, to Commission approval and there has been no effort to exhaust the administrative remedy by seeking such approval?

4. Was the court below warranted, pending determination of the merits of the petition to review, in staying the effect of the challenged amendment to the Commission's exemption rule where the practical effect of the stay was (a) to continue an exemption which the Commission, in accordance with the discretion vested in it by Section 3 (d) of the Holding Company Act, had withdrawn as contrary to the public interest, (b) to restrain the Commission from holding administrative hearings, and (c) to preclude a district court outside the District of Columbia from determining the course of procedure to be followed in a bankruptcy reorganization proceeding long pending in that court?

STATUTE AND RULE INVOLVED

The action of the Commission complained of arises out of its administration of the Public Utility Holding Company Act of 1935 (hereinafter sometimes referred to as "the Holding Company Act" or "the Act").[1] Of particular application in this case are Sections 3 (d), 11 (f), 20 (a), 20 (c) and 24 (a) of the Act and the Com-

[1] Title 1, 49 Stat. 803 (1935), 15 U. S. C. 79, et seq. Pamphlet copies of the Act and of the Commission's rules thereunder are supplied herewith.

mission's Rules U–49 and U–100, which are set forth in the Appendix hereto.

STATEMENT

Philadelphia Company, while a subsidiary in the Standard Gas and Electric Company-Standard Power and Light Corporation holding company system,[2] is itself the top holding company in a major holding company system comprising some 55 direct and indirect subsidiaries engaged in the business of electric, gas and transportation operations. There is presently pending before the Commission a proceeding under Section 11 (b) (2) of the Act to determine what action should be required to simplify Philadelphia Company's holding company system in view, *inter alia,* of the intercorporate relationships between Philadelphia Company and its subsidiary companies, including particularly various guarantees by Philadelphia Company of subsidiary obligations in the Pittsburgh Railways situation.[3] (R. 118, 120.)

Pittsburgh Railways Company is engaged in operating, under leases and operating agreements from both affiliated and non-affiliated companies, the street railway system in the City of Pitts-

[2] See *In re Standard Gas and Electric Co.*, 151 F. 2d 326 (C. C. A. 3), certiorari denied, 327 U. S. 796.

[3] *In the Matter of Philadelphia Company*, Holding Company Act Release No. 7025. It appears from public files of the Commission that during the year 1945 more than $1,500,000 was paid by Philadelphia Company on account of these guaranty obligations. (R. 123.)

burgh. It and its lessor companies have large amounts of debt and other securities outstanding in the hands of the public. Pittsburgh Railways Company has been in reorganization since 1938 and the Commission is a party to the proceeding pursuant to Section 208 of Chapter X of the Bankruptcy Act (11 U. S. C. 608). A major problem in the reorganization proceeding has been how to simplify the complex relationships between Pittsburgh Railways Company and its lessor companies. A sharply controverted issue is whether Philadelphia Company's interest in Pittsburgh Railways and its subsidiary and lessor companies should be subordinated to public security holders of these companies. Prior to February 28, 1947, Pittsburgh Railways had been exempt from the Act by Commission Rule U–49 (*infra*, p. 6) issued pursuant to Section 3 (d) of the Act. (R. 44, 118, 120, 115.)

No hearings in the bankruptcy court had then been held on any plan of reorganization. A plan had been filed and approval of the proposed capitalization had been secured from the Pennsylvania Public Utility Commission in 1942, but before hearings were held on that plan in the reorganization court litigation ensued with reference to the scope of the jurisdiction of that court,[4] the result of which litigation required

[4] *In re Pittsburgh Railways Co.*, 155 F. 2d 477 (C. C. A. 3), certiorari denied, 329 U. S. 731.

that amendments be made to the plan previously filed.

Thereafter, and prior to the time the trustee filed such amendments, the Commission acted to amend its Rule U–49 (c) under the Holding Company Act so as to withdraw exemption from subsidiaries with obligations guaranteed or assumed by the non-exempt holding company.[5] This amendment was admittedly based upon the experience of the Commission with the Philadelphia Company and Pittsburgh Railways, which presented the only situation presently within the class affected (see pp. 15–16, *infra*). The most significant effect of the amendment on the reorganization of Pittsburgh Railways is to withdraw the prior exemption from Section 11 (f) and thereby to require Commission approval of any plan for reorganization prior to its submission to the reorganization court. It also makes it necessary for the trustee to seek Commission authorization of certain other transactions to the extent that the Act so requires in the absence of exemption.

In connection with its rule amendment the Commission gave public notice of proposed rule making in compliance with Section 4 of the Administrative Procedure Act, 60 Stat. 238, according interested persons an opportunity to present their views in writing and orally before the Commission (R. 7–11, 25–26, 110). Philadelphia Company

[5] The exemption so withdrawn applied only to subsidiaries in proceedings under Chapter X of the Bankruptcy Act with respect to transactions approved by the reorganization court.

objected to the amendment of the rule, contending, *inter alia*, that since the rule could only have the effect of withdrawing the exemption from the single group of companies involved in the Pittsburgh Railways reorganization the proceedings looked to the adoption of an "order" rather than a rule, that it was entitled to have proponents of the amendment to the rule assume a burden of proof, and that there should be a factual hearing appropriate for adjudicatory procedures. (R. 35–42, 78–96). The Commission permitted Philadelphia Company to make an offer of proof (R. 34, 107–110), and proceeded to adopt and promulgate the amendment on the basis of its experience in the administration of the Act, without purporting to act upon evidence or formal proof (R. 132–134). The Commission set forth its reasons for such action in a "memorandum of views" (R. 111–131), stating that the experience with the Philadelphia Company showed that the relationship between a holding company and subsidiaries whose debts it had guaranteed or assumed required the latter as well as the former to be dealt with under the Act, and concluding that it should remove "an existing self-imposed limitation upon the exercise of such jurisdiction as is conferred upon us by the Public Utility Holding Company Act" (R. 130).

On March 22, 1947, a few days prior to the date that the Commission's action in amending its rule was to become effective, Philadelphia

Company filed in the Court of Appeals for the District of Columbia a petition to review that action under Section 24 (a) of the Act and a motion for interim "stay" thereof (R. 135–151, 151–152). On March 27, 1947, the Commission filed objections to the motion for stay and moved to dismiss the petition for review as not relating to an "order" within the scope of Section 24 (a) and as not presenting substantial basis for challenge of the Commission's action (R. 153–163, 164–170).

On October 8, 1947, the court below rendered its decision holding that the action of the Commission amending its rule was reviewable as an "order" under Section 24 (a) of the Act (R. 199, 228–229). The court's order denied the Commission's motion to dismiss and granted Philadelphia Company's motion for stay (R. 231).

While the motion to dismiss and motion for stay were still pending in the court below, questions were raised in the reorganization court as to whether that court should commence plan hearings or, in compliance with Section 11 (f) of the Holding Company Act, defer court hearings until after approval of a plan by the Commission. The Chapter X trustee on August 7, 1947, had filed with the reorganization court amendments to the earlier reorganization plan, and on September 11, 1947, petitioned that a time be set for plan hearings thereon (R. 233–234). At the oral argument before the reorganization court on October 7, 1947, there appeared to be uncertainty as to the

effect of the proceeding pending in the Court of Appeals, and a party to the reorganization suggested that the hearings on the amended plan be held before a special master appointed by the reorganization court and a hearing officer appointed by the Commission.[6] The reorganization court expressed the hope that the parties, including the Commission, would agree upon such a procedure and accorded further opportunity to file memoranda relating thereto. (R. 235–236.)

Prior to the date set for the filing of such memoranda, the court below entered its order of October 8, 1947, denying the Commission's motion to dismiss the petition for review and staying the effect of the Commission's action in amending its Rule U–49 (c) (R. 231). On October 13, 1947, the Commission advised the reorganization court that it concurred in the suggestion for joint or concurrent plan hearings to be held before the special master and a hearing officer of the Commission, and stated that it would seek a modification of the stay by the Court of Appeals for the District of Columbia to permit such procedure (R. 236). Accordingly, it moved for such modification in the court below on October 17, 1947 (R. 232). On Octo-

[6] While this suggestion had certain drawbacks from the Commission's point of view and did not resolve the question of whether the Commission itself or the court should determine in the first instance whether the plan should be approved, it would at least permit the taking of testimony for purposes of Commission approval of the plan pending resolution of the problem posed by the petition to review.

ber 21, 1947, before the court below had acted on the Commission's motion to modify the stay, the reorganization court ordered plan hearings to be held before its special master to commence on November 12, 1947 (R. 257, 261–263),[7] stating in the accompanying opinion (R. 260–261):

> If it should appear hereafter that there is authority for separate hearings to be conducted at the same time and place before a Special Master appointed by this Court and by an officer appointed by the Commission and that such concurrent hearings would speed the proceedings, then an appropriate form of order or orders may be submitted for the consideration of this Court.

The Court of Appeals was advised of this order. On November 4, 1947, the Court of Appeals issued its order, without opinion, denying the motion of the Commission for a modification of its stay (R. 290).

REASONS FOR GRANTING WRIT

1. Whether the statutory procedures for re-

[7] Hearings on the plan were temporarily stayed by the Court of Appeals for the Third Circuit in connection with an appeal by parties to the reorganization of Pittsburgh Railways Company, unrelated to the validity of the Commission's amendment to its Rule U–49 (c). That appeal was decided on November 26, 1947 and the stay was vacated. *Matter of Pittsburgh Railways Company, Debtor, Cornelius A. Sullivan, et al., Appellants*, C. C. A. 3, No. 9541. Hearings were commenced before a special master on December 1, 1947.

view of a Commission "order" prescribed by Section 24 (a) of the Holding Company Act may be invoked to review the quasi-legislative promulgation of a rule or amendment thereto is a question of first impression and of importance both in the administration of the Holding Company Act and in the general field of administrative law.[8] The question is not whether the Commission's action may be subject to judicial review incident to enforcement proceedings or in any other case where a party to the proceeding, including the Commission, may rely upon the challenged amendatory action, nor under appropriate circumstances in a suit for injunction in a court of general equitable jurisdiction.[9]

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[8] Review provisions similar to Section 24 (a) are contained in numerous other acts, *e. g.* Communications Act of 1934, 48 Stat. 1093, sec. 402 (b)–(f), 47 U. S. C. 402 (b)–(f); Securities Act of 1933, 48 Stat. 80, sec. (9) (a), 15 U. S. C. 77i; Trust Indenture Act (1939), 53 Stat. 1175, sec. 322 (a), 15 U. S. C. 77vvv (a); Securities Exchange Act, 48 Stat. 901, sec. 25 (a), 15 U. S. C. 78y (a); Investment Company Act (1940), 54 Stat. 844, sec. 43 (a), 15 U. S. C. 80a–42 (a); Investment Advisers Act (1940), 54 Stat. 855, sec. 213 (a), 15 U. S. C. 80b–13 (a); Fair Labor Standards Act, 52 Stat. 1065, sec. 10 (a), 29 U. S. C. 210 (a); Natural Gas Act, 52 Stat. 831, sec. 19 (b), 15 U. S. C. 717r (b); and Federal Power Act, 49 Stat. 860, sec. 313 (b), 16 U. S. C. 825*l* (b).

[9] The reorganization court in the Third Circuit whose jurisdiction is displaced is in a far better position than the court below to determine both whether there is substance to Philadelphia Company's objections and whether they present a sufficiently imminent problem to warrant judicial interposition before exhaustion of administrative remedies. Indeed, it is the only court which can deal comprehensively, and at

Rather the question is whether the mere promulgation of a rule or amendment thereto should be deemed to create a case or controversy independent of any enforcement efforts or of a showing of irreparable injury from such promulgation, and to confer jurisdiction thereof under Section 24 (a) upon the court below, or any circuit court of appeals. To hold Section 24 (a) applicable is to ignore important distinctions, expressed in the statute itself and inherent in decisions of this Court, between prescribed administrative procedures, and provision for judicial review thereof, applicable (a) to quasi-judicial, or adjudicatory, administrative action manifested by an "order" and (b) to quasi-legislative action manifested by a "rule" or "regulation".

The review procedures in Section 24 (a) are concerned exclusively with review of adjudicatory procedures, being limited to "an order issued by

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one time, with all of Philadelphia Company's objections to the submission of the plan for Commission approval under Section 11 (f), since Philadelphia Company has objected not only to the validity of the rule amendment but also to the application of Section 11 (f) to the Pittsburgh Railways reorganization irrespective of the validity of the rule amendment. It is to be noted that this reorganization proceeding has been before the District Court in Pittsburgh for almost ten years and before the Circuit Court of Appeals for the Third Circuit a number of times. *In re Reorganization of Pittsburgh Railways Co.*, 111 F. 2d 932, affirmed *sub. nom. Philadelphia Company* v. *Dipple*, 312 U. S. 168; *In re Pittsburgh Co.*, 117 F. 2d 1007; *In re Pittsburgh Railways Co.*, 155 F. 2d 477, certiorari denied, 329 U. S. 731; *In re Pittsburgh Railways Co.*, 159 F. 2d 630, certiorari denied, 331 U. S. 819.

the Commission". The term "order" must be construed with reference to its use throughout the Act in contradistinction to "rules and regulations". Thus a great many provisions specifically limit the Commission to acting by order.[10] Others expressly authorize or prescribe regulation either by "order" or "by rule and regulation".[11] Provisions authorizing or directing the Commission to act only by "rules and regulations" are the exception and apply in a context which emphasize

[10] Section 7 (b) relating to procedures after an "order to show cause" why a declaration regarding a security issue shall become effective prescribes the entry of an order after opportunity for hearing either permitting or refusing effectiveness. Section 10 (d) prescribes the entry of an "order either granting or, after notice and opportunity for hearing, denying approval * * *" of a proposed acquisition. Section 11 (b) makes it the duty of the Commission "to require by order" compliance with the integration and simplification standards of Section 11. Similarly, procedure by order is the exclusive method for determining whether the parent-subsidiary or affiliate relationships exist under the tests prescribed in Sections 2 (a) (7), 2 (a) (8) and 2 (a) (11) (D) and under Section 2 (b).

[11] Examples are provisions for exclusion from the prima facie definitions of "electric utility company" and "gas utility company" under Section 2 (a) (3) and 2 (a) (4). Other examples are the exemption provisions of Section 3 (a) and 3 (b), except that Section 3 (c) expressly provides that exemptions granted by order under Section 3 (a) or 3 (b) may be revoked only by order. Again Sections 11 (e), 12, 13, 14 and 15 authorize "rules and regulations or orders" covering a wide area of regulation of the affairs of holding companies and their subsidiaries, including inter-company transactions, proxy solicitation, accounts, reports, servicing activities, and submission of voluntary reorganization plans.

768933—47——3

the quasi-legislative function involved. See, for example, Sections 3 (d) and 17 (b) and (c), authorizing exemption on policy grounds. Again the general provisions of Section 20 dealing with rules, regulations and orders clearly distinguish between "orders" which shall be issued only after opportunity for hearing and "rules and regulations" effective upon publication in the manner which the Commission shall prescribe (Section 20 (c)).

In addition, the subsidiary procedural provisions of Section 24 (a) show that it was intended to apply exclusively to adjudicatory determinations by "order" on the basis of evidence. See *Federal Power Commission* v. *Metropolitan Edison Company,* 304 U. S. 375, at 384, discussing parallel provisions of the Federal Power Act. Thus there is a requirement for the filing of "a transcript of the record upon which the order complained of was entered", and it is provided that "the findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive", and that under certain circumstances the court may order "additional evidence to be taken before the Commission and to be adduced upon the hearing." These provisions show that Section 24 (a) was meant to reach administrative adjudications based upon evidence of record and that the section cannot appropriately be applied to rules and regula-

tions, which the Commission may or may not adopt in its discretion and as to which no formal hearing is required. Compare Administrative Procedure Act, Section 4, 60 Stat. 238; 5 U. S. C. A. 1003. Moreover, if a rule is reviewable by the circuit courts of appeals under Section 24 (a) rather than in a reorganization or enforcement court when the rule is sought to be applied, potentially aggrieved parties will be forced to seek review in the circuit courts of appeals within sixty days of the rule's promulgation even though they may not know at that time whether or to what extent the rule will harm them. *Yakus* v. *United States*, 321 U. S. 414.

The court below rested its decision in part on the fact that the amendment to the rule had the effect of withdrawing exemption only from the Pittsburgh Railways group of companies. But this fact does not transform a quasi-legislative rule into a reviewable order under Section 24 (a). The exemption both before and after the amendment is of general import, and would apply to any company similarly situated. Before the amendment it affected only two holding company systems; it might well have affected only one. But since the exemption was granted by rule it was obviously appropriate for the Commission to withdraw it by rule, if it finds such action required by the public interest as embodied in the

Act, no matter how limited the scope of either the original exemption or the modification.[12] Whether the amending rule narrowing the exemption is arbitrary because only one group of companies is affected does not determine its reviewability under Section 24 (a), but goes to the merits of the rule's validity as a reasonable classification under Sections 3 (d) and 20 (c). We believe the Commission's memorandum of explanation (R. 111–131) shows that the amendment does not contain an arbitrary classification; the issue here, however, is not whether the amendment is arbitrary but whether the court of appeals, acting under Section 24 (a), rather than a court in which the rule is sought to be applied, is the proper reviewing tribunal.

The court below relied upon *Rochester Telephone Corporation* v. *United States,* 307 U. S. 125, and *Columbia Broadcasting System* v. *United States,* 316 U. S. 407. We think that in that respect the decision of the court below rests upon a misconception of these decisions which is of far-reaching importance. The *Rochester Telephone* case did involve review of an administrative adjudication of status to ascertain whether there was substantial evidence developed at a

[12] Actually the Rule as amended continues exemptions for a narrowly defined class of companies presently including only the American Fuel and Power-Inland group, in which Philadelphia Company claims no interest. The Pittsburgh Railways group of companies is merely restored to the broad statutory class of non-exempt companies.

hearing to support an administrative finding of "control" by a parent of its subsidiary. But in that case the Commission had ordered Rochester to show cause why it should not comply with general orders, and a formal hearing on Rochester's status had been held. The case did not involve a challenge to the exercise of delegated power to adopt and amend quasi-legislative rules.

Nor does *Columbia Broadcasting System* v. *United States,* 316 U. S. 407, support the decision below. That case upheld the jurisdiction of the three judge court provided for in the Urgent Deficiencies Act to entertain a complaint to enjoin and set aside an "order" of the Federal Communications Commission adopting certain substantive regulations which were held by their mere promulgation to threaten irreparable injury. But a suit under the Urgent Deficiencies Act is a suit in equity which the statute requires to be heard by three judges instead of one. That statute has often been held to permit review of general administrative regulations where the ordinary requisite of irreparable injury necessary in equity cases was found to exist. See cases cited in *Columbia* case, 316 U. S. at 417, 419. While the review procedure there applicable was, like Section 24 (a), applicable in terms to an "order", the term "order" was used in an entirely different context from its use in Section 24 (a) of the Holding Company Act.

The court below relied in part on the Com-

mission's Rule U–100 (b), a point not urged before the Commission (R. 224–227). By this paragraph of its general rules and regulations the Commission merely stated that it "may", with respect to any unexecuted transactions exempted by any rule, suspend summarily the exemption and withdraw it after opportunity for hearing, if that course appears to be in the public interest.[13] Recognition that such procedure "may" be appropriate in some instances is clearly not an intimation that the Commission considers procedure by order as exclusive, particularly as applied to a rule under Section 3 (d) authorizing exemption only by rule. *Cf.* the last sentence of Section 3 (c). If the Commission had followed the Rule U–100 procedure in this case, it might well have been confronted with objections by Philadelphia Company at least to suspension of the exemption pending hearing. In any event, the rule can neither withdraw statutory authority to amend rules nor make an exercise of that power an adjudication for purposes of review merely because of a challenge to the basis for classification used.

2. As we have seen, the principal effect of the withdrawal of the exemption previously ac-

[13] As the Commission indicated in a report to Congress, such procedure by order in such cases may have the advantage of avoiding textual complexity in rules published for the general guidance of the industry. Seventh Annual Report of the Securities and Exchange Commission, page 117.

corded under Rule U–49 (c) is to require the reorganization plan for Pittsburgh Railways Company to be submitted to Commission approval after hearing prior to its submission to the reorganization court. The court below pointed out that removal of the exemption would also subject Pittsburgh Railways Company "to the operation of all other provisions of the Act applicable to subsidiaries of registered holding companies" (R. 229). As in the case of the reorganization plan, however, the other provisions of the Act, with a few minor exceptions, merely subject proposed transactions to Commission approval, and judicial review may be had of Commission action denying such approval. The exceptions relate to such matters as political contributions by the company involved (Section 12 (h)) and to employees' sales or house-to-house sales of holding company securities (Section 6 (c)). It has not been alleged that such matters were contemplated by Pittsburgh Railways Company and it is not to be supposed that such matters could, in any event, have the approval of the reorganization court. No plan harmful to respondent can become effective until after the Commission hearing, Commission approval and other judicial approval. The assertion of review jurisdiction by the court below, and its interim stay restraining Commission proceedings, is therefore open to all of the objections, which, as this Court has repeatedly held, preclude review of interlocutory administrative

orders and "judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50–51, and cases cited therein; *Federal Power Commission* v. *Metropolitan Edison Company*, 304 U. S. 375; *Federal Power Commission* v. *Arkansas Power & Light Co.*, 330 U. S. 802; *Macauley* v. *Waterman Steamship Corporation*, 327 U. S. 540; *United States* v. *Los Angeles & Salt Lake R. R. Co.*, 273 U. S. 299, 309–310; *Smith* v. *Interstate Commerce Commission*, 245 U. S. 33.

3. This is particularly true of the stay granted by the court below. In staying the "order" of the Commission the court prevented the Commission from taking any action predicated on the validity of the amending rule. The stay has prevented the Commission from holding any hearing on the plan, including the joint hearing suggested by the district court in Pennsylvania as a means of avoiding the duplication in effort, time and expense which would otherwise result if the Commission's rule was ultimately held to be valid. The court below made no finding that irreparable injury would result from the holding of the administrative hearings which its stay had prevented. It merely concluded that it was wasteful of time, effort and expense, to hold administrative hearings which might prove futile. Such costs, however, are not sufficient to warrant a

court in enjoining an administrative proceeding. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41. Any such additional expenses would be minimized, if not completely avoided, by combining the Commission's hearing with that to be held by the Special Master acting in behalf of the district court.

Other aspects of the stay order of the court below threaten an even more serious interference with the Commission's statutory duties. Thus, the order purports to stay the action of the Commission in adopting the disputed amendment to Rule U–49 (c), thereby restoring the exempt status of the Pittsburgh Railways group of companies under the rule as formerly in effect, whether or not the Commission acted lawfully in withdrawing the exemption.[14] The plan hearings before the special master which began on December 1, 1947, may well be concluded prior to final action by this Court upon the petition for a writ of certiorari, and unless, the stay order be vacated or modified there is danger of a ruling upon the merits of the plan either by the special master or by the reorganization court itself, thereby irreparably frustrating the Act's requirement for Commission approval of a plan prior to its submission to the court.

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[14] In ordering the special master to commence hearings on the plan and to report on the merits thereof, the reorganization court construed the stay order of the court below as making it unnecessary for the reorganization court "to determine whether Section 11 (f) of the Public Utility Holding Company Act is applicable to this proceeding" (R. 257a).

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted, and that pending final action by this Court on the petition, the stay order should be set aside or in the alternative modified so as to permit the Commission to hold such hearings and the reorganization court to take such action in connection with the reorganization proceedings as would be appropriate in the absence of such stay.

Respectfully submitted,

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Securities and Exchange Commission.

DECEMBER 1947.

APPENDIX

Applicable provisions of Public Utility Holding Company Act of 1935 (Title I, 49 Stat. 803, 15 U. S. C. 79, et seq.):

Section 3 (d):

The Commission may, by rules and regulations, conditionally or unconditionally exempt any specified class or classes of persons from the obligations, duties, or liabilities imposed upon such persons as subsidiary companies or affiliates under any provision or provisions of this title, and may provide within the extent of any such exemption that such specified class or classes of persons shall not be deemed subsidiary companies or affiliates within the meaning of any such provision or provisions, if and to the extent that it deems the exemption necessary or appropriate in the public interest or for the protection of investors or consumers and not contrary to the purposes of this title.

Section 11 (f):

In any proceeding in a court of the United States, whether under this section or otherwise, in which a receiver or trustee is appointed for any registered holding company, or any subsidiary company thereof, the court may constitute and appoint the Commission as sole trustee or receiver, subject to the directions and orders of the court, whether or not a trustee or receiver shall theretofore have been appointed, and in any such proceeding the court shall not appoint any person other than the Commission as

trustee or receiver without notifying the Commission and giving it an opportunity to be heard before making any such appointment. In no proceeding under this section or otherwise shall the Commission be appointed as trustee or receiver without its express consent. In any such proceeding a reorganization plan for a registered holding company or any subsidiary company thereof shall not become effective unless such plan shall have been approved by the Commission after opportunity for hearing prior to its submission to the court. Notwithstanding any other provision of law, any such reorganization plan may be proposed in the first instance by the Commission or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization. The Commission may, by such rules and regulations or order as it may deem necessary or appropriate in the public interest or for the protection of investors or consumers, require that any or all fees, expenses, and remuneration, to whomsoever paid, in connection with any reorganization, dissolution, liquidation, bankruptcy, or receivership of a registered holding company or subsidiary company thereof, in any such proceeding, shall be subject to approval by the Commission.

Section 20 (a):

The Commission shall have authority from time to time to make, issue, amend, and rescind such rules and regulations and such orders as it may deem necessary or appropriate to carry out the provisions of this title,

including rules and regulations defining accounting, technical, and trade terms used in this title. Among other things, the Commission shall have authority, for the purposes of this title, to prescribe the form or forms in which information required in any statement, declaration, application, report, or other document filed with the Commission shall be set forth, the items or details to be shown in balance sheets, profit and loss statements, and surplus accounts, the manner in which the costs of all assets, whenever determinable, shall be shown in regard to such statements, declarations, applications, reports, and other documents filed with the Commission, or accounts required to be kept by the rules, regulations, or orders of the Commission, and the methods to be followed in the keeping of accounts and cost-accounting procedures and the preparation of reports, in the segregation and allocation of costs, in the determination of liabilities, in the determination of depreciation and depletion, in the differentiation of recurring and nonrecurring income, in the differentiation of investment and operating income, and in the keeping or preparation, where the Commission deems it necessary or appropriate, of separate or consolidated balance sheets or profit and loss statements for any companies in the same holding-company system.

Section 20 (c):

The rules and regulations of the Commission shall be effective upon publication in the manner which the Commission shall prescribe. For the purpose of its rules, regulations, or orders the Commission may classify persons and matters within its jurisdiction

and prescribe different requirements for different classes of persons or matters. Orders of the Commission under this title shall be issued only after opportunity for hearing.

Section 24 (a):

Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds

for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

General Rules and Regulations under the Public Utility Holding Company Act of 1935:

RULE U–49. CERTAIN EXEMPTIONS GRANTED TO NON-UTILITY SUBSIDIARIES

(*a*) *Companies exempted.*—The exemptions provided by this rule shall apply to any subsidiary of a registered holding company which subsidiary is not—

(1) A holding company,

(2) A public-utility company,

(3) A company engaged in the business of performing services or construction for or selling goods to associate holding or public-utility companies, or

(4) A company controlling, directly or indirectly, any company specified in clauses (1) to (3) above.

(*b*) *Exemption from sections 6 (a) and 12 (c).*—Any such subsidiary company shall be exempt from the provisions of section 6 (a) of the Act with respect to the issuance or sale of any securities to the vendor of supplies or equipment for use in the business of such subsidiary company, and from the provisions of any rule under section 12 (*c*) of the Act with respect to the acquisition, redemption or retirement of any such securities.

(*c*) *Transactions approved by a reorganization court.*—Any such subsidiary company which is the subject of a proceeding for reorganization in any court of the United States in which proceeding the Commission has filed a notice of appearance pursuant to section 208 of chapter X of the Bankruptcy Act, as amended, or which is a subsidiary within the meaning of section 106 (13) of said chapter X, or of section 2 (a) (8) of the Public Utility Holding Company Act, of any such subsidiary company which is the subject of such a proceeding, shall be exempt from any provision of the Act applicable to the appointment of any trustee for such company or to any transaction entered into with the approval (direct or indirect) of such court: *Provided,* That such transaction does not involve the acquisition of any utility assets or securities of any public-utility or holding company. * * * *Provided further, that this paragraph shall be inapplicable to any subsidiary company which is the subject of reorganization proceedings (or any subsidiary of such sub-*

sidiary company within the meaning of Section 106 (13) of said chapter X or of Section 2 (a) (8) of the Public Utility Holding Company Act), where such subsidiary company, or any subsidiary thereof, is the issuer of any securities, or is the obligor on any obligations, which have been guaranteed or assumed by any registered holding company. * * *

The last provision of the above rule, which is here set forth in italics was added by the action of the Commission which petitioner seeks to challenge.

RULE U–100. ORDERS GRANTING OR WITHDRAWING EXEMPTIONS

(*a*) *Orders granting exemption from rules.*—Any transaction subject to the requirements of any rule promulgated under the Act may be exempted therefrom by the Commission upon application, or upon its own motion provided an application for approval of such transaction or a declaration with respect thereto is pending, if it appears to the Commission that such requirements as applied to such transaction are not necessary or appropriate in the public interest or for the protection of investors or consumers.

(*b*) *Orders withdrawing exemption.*—Any unexecuted transaction which is within the exemption provided in any rule from the requirements of any provision of the Act or of the rules, may nevertheless be subjected thereto by order, after notice and opportunity for hearing, if it appears to the Commission that the withdrawal of such exemption as applied to such transaction would be appropriate in the public interest or the interest of investors or consumers.

The Commission may by such notice suspend the applicability of any such exemption to any transaction pending final determination.

U. S. GOVERNMENT PRINTING OFFICE: 1947

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 480

SECURITIES AND EXCHANGE COMMISSION,
PETITIONER

v.

PHILADELPHIA COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

REPLY MEMORANDUM FOR THE PETITIONER

I

Respondent Philadelphia Company states that the case presents in last analysis a conflict of jurisdiction between the Commissioner and the reorganization court. The petition for certiorari does not seek a ruling as to the jurisdiction and procedure of the reorganization court but as to the jurisdiction of the court below to pass upon the jurisdiction of the reorganization court. We believe that the reorganization court, when and if a controversy is presented in concrete form,

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is the only court which has jurisdiction to decide, in the first instance, the effect upon its own jurisdiction and procedure of the Commission's amendment to Rule U-49 (c) under the Public Utility Holding Company Act.

Respondent also urges that the petition for a writ of certiorari is premature, and also that the stay orders of the court below are not reviewable on writ of certiorari. *Federal Power Commission* v. *Metropolitan Edison Company*, 304 U. S. 375, cited by respondent (p. 8) is itself an answer to both of these contentions. In that case a writ was granted, and ultimately this Court reversed an order of a circuit court of appeals which (1) denied a motion to dismiss a proceeding for review of an interlocutory administrative order and (2) continued a temporary stay of administrative proceedings.

The question of whether the validity of the amendment to Rule U-49c may be decided in due course in the reorganization proceeding itself, or whether the court below should resolve it in the guise of reviewing as an "order" the Commission's amendatory action, should be decided by this Court before, rather than after, a decision on the merits. Review by this Court after a decision on the merits—whether before or against the validity of the rule—would not protect the reorganization court from the embarrassment of an advisory ruling by a circuit court of appeals outside its own circuit, nor protect the Com-

mission from delaying the reorganization court's coming to grips with any problems which the amendatory action will present in that court. Similarly the improvident stay order of the court below calls for summary corrective action to protect the administrative process from interference in contravention of repeated rulings of this Court.

II

Respondent urges that the record before this Court is not the same as the record before the court below when it denied the Commission's motion to dismiss. The first order sought to be reviewed, which denied the Commission's motion to dismiss and granted a stay, was decided on the basis of affidavits which described the proceedings before the Commission leading to the adoption of the disputed amendment to Rule U–49 (c). After that decision and before moving to modify the stay the Commission certified a transcript of the administrative proceedings (R. 308–309, 480). Respondent points to no material respect in which the facts revealed by the full administrative record as certified to the court below differs from the facts as presented in connection with the motion to dismiss. Since the court below had before it the full administrative record when it considered and denied the Commission's motion to modify the stay, which is the second of the orders sought to be reviewed, there can be no question

but that the full administrative record is properly before this Court whether or not this Court should deem it relevant to the review of the first of the two orders of the court below.

Respectfully submitted.

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Solicitor General.

ROGER S. FOSTER,
Solicitor,
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JANUARY 1948.

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FILE COPY

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Supreme Court of the United States

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PHILADELPHIA COMPANY.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR PHILADELPHIA COMPANY, RESPONDENT, IN OPPOSITION.

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INDEX.

TABLE OF AUTHORITIES.

STATUTES PAGE

IN THE

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OCTOBER TERM, 1947.

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BRIEF FOR PHILADELPHIA COMPANY, RESPONDENT, IN OPPOSITION.

COUNTER-STATEMENT OF CASE.

The Securities and Exchange Commission seeks review of two orders of the Court of Appeals for the District of Columbia:

(a) Order entered October 8, 1947, (R. 231 a) denying a motion to dismiss a petition for review of the Commission's order (dated February 28, 1947) amending its Rule U-49 so as to withdraw an exemption from the Holding Company Act with respect to Pittsburgh Railways Company reorganization proceeding pending in the Western District of Pennsylvania, and

(b) Order entered October 8, 1947, (R. 231 a) staying the Commission's order of February 28, 1947, pending the disposition of the petition for review; and order entered November 4, 1947 (R. 290 a) refusing to modify the stay.

Pittsburgh Railways Company has been in bankruptcy reorganization under Section 77B and Chapter X of the Bankruptcy Act since May 10, 1938, in the District Court for the Western District of Pennsylvania. The Trustees in reorganization have continued to operate the same properties as were operated by the Debtor prior to the initiation of the bankruptcy proceedings. These consist of the properties owned by Pittsburgh Railways Company, and also the properties of 53 so-called "underlier companies" whose properties were operated by Pittsburgh Railways Company pursuant to a system of leases, operating agreements and stock ownership.

Philadelphia Company, the petitioner for review in the Court below, is the owner of stock of gas, electric and street railway subsidiaries, and is a public utility holding company under the Public Utility Holding Company Act of 1935 (15 U.S.C.A. 79, *et seq.*).

Philadelphia Company owns all of the stock of Pittsburgh Railways Company and of certain of its underlier companies. Philadelphia is also a large creditor of Pittsburgh Railways Company and the underlier companies and is a guarantor of obligations of certain of those companies. Certain of the underlier companies of Pittsburgh Railways Company, however, are publicly-controlled and are not subsidiaries of any registered holding company.

Although it was a subsidiary of Philadelphia Company, Pittsburgh Railways Company was the subject of exemptions, pursuant to the rules of the Securities and Exchange Commission, from the provisions of the Public Utility Holding Company Act. Such exemption was first granted by the Commission's Rule U-3D-5, which was followed (incident to a general revision of the Commission's rules as of April 1, 1941) by Rule U-49 (R. 136 a).

The effect of these exemptions was to leave the reorganization proceeding unaffected by the Holding Company Act, and free to follow the normal procedures of Chapter X of the Bankruptcy Act. Under Section 172 of the Bankruptcy Act[1], S.E.C. was and is authorized to render an *advisory* opinion upon a plan of reorganization.

If, however, the reorganization were subject to the provisions of Section 11(f) of the Holding Company Act[2], a plan of reorganization could not become effective unless it had been approved by S.E.C. prior to its sub-

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[1] The full text of this Section (11 U.S.C.A. 572) is as follows: "After the hearing, as provided in section 169 or section 170 of this Act, and before the approval of any plan, as provided in section 174 of this Act, the judge may, if the scheduled indebtedness of the debtor does not exceed $3,000,000, and shall, if such indebtedness exceeds $3,000,000, submit to the Securities and Exchange Commission for examination and report the plan or plans which the judge regards as worthy of consideration. *Such report shall be advisory only.*" (Italics supplied).

[2] Section 11(f) (15 U.S.C.A. 79k [f]) is quoted in the Petition for Certiorari, pp. 23-24. The section provides in part: "In any proceeding in a court of the United States, whether under this section or otherwise, in which a receiver or trustee is appointed for any regis-

mission to the Court. Under Section 11(f), the Commission has a veto power over a plan of reorganization, in lieu of its advisory jurisdiction under Section 172 of the Bankruptcy Act. The Commission also asserts the sole right to conduct hearings on the plan of reorganization, requiring the Court to act solely upon the record made before the Commission (R. 128 a; *In re Midland United Co.*, 58 F. Supp. 667; D. Del., 1944). As a result of this procedure, the Commission would limit the consideration of the Reorganization Court to such plan as had been approved by the Commission, in lieu of the broad scope of inquiry permitted the Court by Section 169 of the Bankruptcy Act.

In reliance, however, upon the exemption granted by the Commission in the reorganization proceedings, various steps were taken in those proceedings:

1. The Reorganization Court entered its order of November 7, 1938, applying the Chandler Act to the plan of reorganization in the Pittsburgh Rail-

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tered holding company, or any subsidiary company thereof, the Court may constitute and appoint the Commission as sole trustee or receiver subject to the directions and orders of the court, whether or not a trustee or receiver shall theretofore have been appointed, and in any such proceeding the court shall not appoint any person other than the Commission as trustee or receiver without notifying the Commission and giving it an opportunity to be heard before making any such appointment. In no proceeding under this section or otherwise shall the Commission be appointed as trustee or receiver without its express consent. *In any such proceeding a reorganization plan for a registered holding company or any subsidiary company thereof shall not become effective unless such plan shall have been approved by the Commission after opportunity for hearing prior to its submission to the Court.*" (Italics supplied).

ways proceeding, and contemplating that the Commission's power would be advisory only. (R. 88 a)

2. A plan of reorganization was prepared which made no provision for its submission to the Securities and Exchange Commission under Section 11(f) (R. 90 a).

3. The plan was presented to the Pennsylvania Public Utility Commission for approval under Section 178 of the Bankruptcy Act. (R. 90 a; 109 a) That Commission, after hearings, approved the plan, and rejected the contention of the Securities and Exchange Commission that the capitalization of the Debtor should be much lower than is provided by the plan. The Pennsylvania Commission was given no indication that the Securities and Exchange Commission would ultimately assert a veto power with respect to its action. (R. 90 a) It is impossible to say that the Pennsylvania Commission's judgment was not influenced by S.E.C.'s disclaimer of the power (now sought to be invoked) of producing a stalemate with the P.U.C. in the event of a difference of views, such as in fact occurred, between the two Commissions.

4. The Plan of Reorganization approved by the Pennsylvania Commission was filed with the Reorganization Court on March 17, 1942. (R. 38 a). If the Securities and Exchange Commission had validly asserted jurisdiction under Section 11(f), it would have been necessary at that time to file the plan with that Commission rather than the Court.

5. By thus allowing the plan to be filed with the Court, the Commission caused to be precipi-

tated the question of the jurisdiction of the Court with respect to underlier companies. (R. 90 a) The Commission thus allowed a different issue to be created than would have been created if the plan had been filed under Section 11(f). Since the plan had been filed only under the Bankruptcy Act, the issue before the Reorganization Court was whether the system could be reorganized as a unit *under the Bankruptcy Act*. There was not presented the question (which would have been present if the Commission had asserted its jurisdiction under Section 11(f)) whether the Commission could deal with the system as a unit (including companies which are not subsidiaries of any holding company) *under the Holding Company Act*. (R. 40 a)

6. The Circuit Court of Appeals for the Third Circuit, sustaining the position of the City of Pittsburgh, handed down a mandate which obviously contemplated that further proceedings be conducted *"in court"*. *In re Pittsburgh Railways Company*, 155 F. 2d 477, 480.

7. By promulgating its Rules U-3D5 and U-49, the Commission made it unnecessary for the Trustees of Pittsburgh Railways Company to give consideration to seeking an exemption under Section 2(a)(8) of the Holding Company Act from the jurisdiction of the Commission.

In February, 1947, long after the inception of the reorganization, the Commission amended its Rule U-49(c) so as to withdraw the exemption previously afforded thereby. *The modification is admittedly applicable only to the Pittsburgh Railways situation.* (R. 127 a)

Philadelphia Company filed a petition for review with the Court of Appeals for the District of Columbia. It also requested a stay of the Commission's action pending disposition of the petition for review. The Commission filed a motion to dismiss the petition for review and objected to the motion for stay. On October 8, 1947, the Court denied the Commission's motion to dismiss and granted Philadelphia Company's request for a stay. The Court stated that "we think the petition for review has prima facie merit". (R. 230 a)

The Commission thereupon certified to the Court its "record" in the proceedings before it (R. 1 a). It also requested a modification of the stay. This modification having been denied by order entered November 4, 1947, the Commission, on November 26, 1947, presented to Chief Justice Vinson a motion for a modification of the stay pending the Commission's application for certiorari. After oral argument in chambers, this motion was denied by the Chief Justice. Plan hearings are now under way in the Reorganization Court.

ARGUMENT.

1. The Petition for Certiorari Is Premature.

The petition for certiorari relates to the denial by the Court below of a motion by the Commission to dismiss a petition for review of certain action by the Commission. The merits of the petition for review are still pending before the Court below. A brief on the merits was filed in that Court by Philadelphia Company (petitioner in the Court below) on November 26, 1947, and a brief on the merits was filed by the Commission (respondent in the Court below) on or about December 22, 1947. It follows that even if we assume (without admitting) that this case should ultimately be reviewed by this Court, the present petition for certiorari would be premature. The normal procedure would be to permit the case to be decided on its merits by the Court below and then, upon the whole record, to grant certiorari with respect to such issues as might require consideration. The granting of the instant petition for certiorari might, on the other hand, require a piecemeal consideration of the case by this Court.

When an administrative agency denies a motion to dismiss, and assumes jurisdiction over a case, an appellate court may not entertain an appeal until the agency has completed its consideration of the case on the merits. The analogy indicates that the denial by an appellate court of a motion to dismiss a petition for review of administrative action is not the proper subject of a petition for certiorari. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *F.P.C. v. Metropolitan Edison Co.*, 304 U. S. 375.

2. It Would Be Inequitable to Permit the Commission to Escape Review of the Merits of Its Action Now Under Review in the Court Below.

In the last analysis, this case presents a conflict of jurisdiction between the Securities and Exchange Commission and the Reorganization Court before which the Pittsburgh Railways reorganization proceeding is pending. The Reorganization Court has, since 1938, followed the normal procedures provided by Chapter X of the Bankruptcy Act. The Commission now seeks to cause the Reorganization Court (whether that Court likes it or not) to relinquish to the Commission the function of making the record in plan hearings. The Commission, moreover, would limit the scope and number of plans of reorganization which might be considered by the Court and would exercise a veto power over any plan. In such context there is, at the very least, a substantial question as to whether the Commission may thus change the rules in the middle of the game and cause the Bankruptcy Court to relinquish its normal functions. Cf. *International Union v. Eagle-Picher M. & S. Co.*, 325 U.S. 335; *U.S. v. Seatrain Lines, Inc.*, 329 U.S. 424.

We emphasize, too, a substantial number of the underlier companies of Pittsburgh Railways Company are not subsidiaries of any registered holding company, but are publicly controlled. (R. 120 a-121 a; 130 a). The Court below now has before it (but has not yet decided) the question whether the Commission acted properly in seeking to extend its jurisdiction under the Holding Company Act to a reorganization including non-

subsidiary companies which are not subject to the Holding Company Act.

There is also the problem of conflict between the Securities and Exchange Commission and the Pennsylvania Public Utility Commission. The plan of reorganization for Pittsburgh Railways Company is admittedly subject to the jurisdiction of the Pennsylvania Commission under Section 178 of Chapter X. That Commission has already approved a plan of reorganization. *Re George,* 41 P.U.R. (N.S.) 193. In the proceeding before the Pennsylvania Commission, the S.E.C. adopted an adversary position to the Plan and contended for a capitalization of $10,000,000. The Pennsylvania Commission, however, disagreed with S.E.C. and approved a capitalization of approximately $30,000,000. At the time the case was before the Pennsylvania Commission and for a long time thereafter, S.E.C. made no assertion of its veto power with respect to a plan of reorganization under Section 11(f) of the Holding Company Act. If such an assertion had been made before the Pennsylvania Commission, it is possible that that Commission might have followed a different course than it actually did. Notwithstanding the difference between the two Commissions, S.E.C. now seeks to justify action which would permit it to assume the function of judge (for the purposes of making the record in plan hearings) in a case in which it has already adopted an adversary position. A further effect of its action would create the apparent likelihood of a stalemate between S.E.C. and the Pennsylvania Commission as to the capitalization of the Debtor.

The foregoing discussion indicates only a few of the problems raised by the merits of the case. We here note

them in support of our contention that it would be most inequitable to permit the Commission to escape review by the Court below of the merits of the action there under review.

3. The Case Presents No Question of General Importance.

It is admitted that the Commission's action now under review in the Court below affects only the reorganization proceedings of Pittsburgh Railways Company (R. 127 a). The case merely turns upon the application of well-settled principles to the facts presented by this particular case.

The petition for certiorari suggests (pages 10-11) that the importance of the case arises because it presents the question whether the statutory procedure for the review of an "order" may be invoked to review the promulgation of a "rule". This statement, however, begs the question. The question is, rather, whether under the particular facts of this case the action to be reviewed may be characterized as a "rule" or "order." In dealing with this question, no new or general principle of law was declared by the Court below. That Court merely applied to a particular fact situation the well-settled principles declared by this Court in *Rochester Telephone Corp. v. U.S.*, 307 U.S. 125, and *Columbia Broadcasting Co. v. U.S.*, 316 U.S. 407.

We direct attention to the fact that this Court has denied certiorari in other cases involving the Pittsburgh Railways reorganization. After deciding a question as to the payment of taxes of underlier companies (*Phila-*

delphia Co. v. Dipple, 312 U.S. 168), this Court has refused to grant certiorari in: *Re Pittsburgh Railways Co.,* 155 F. 2d 477, certiorari denied, 329 U.S. 732; and in *Re Pittsburgh Railways Co.,* 159 F. 2d 630, certiorari denied, 331 U.S. 819.

4. The Record Before This Court Is Not the Same as the Record Which Was Before the Court Below When It Denied the Commission's Motion to Dismiss.

Section 24(a) of the Public Utility Holding Company Act requires that, where a petition for review is filed, the Commission shall certify the "record" in the case to the reviewing Court. In the present case, however, the Commission did not file any record in the first instance, but merely filed a motion to dismiss. Consequently, the court below, in assuming jurisdiction over the petition for review acted solely upon the petition for review, a motion to dismiss, and a reply to the motion to dismiss. Not until after the motion to dismiss was denied did the Commission certify to the Court below its "record" in the case. It then sought a modification of the Court's stay-order. When this was denied, it caused to be certified to this Court the entire record before the Court below which, by that time, included the "record" before the Commission.

We emphasize that this Court is asked to consider the denial of its motion to dismiss the petition for review upon a more complete record than was available to the Court below when it acted upon the motion to dismiss. The Commission took the responsibility for excluding

its "record" from the consideration of the Court below when the motion to dismiss was under consideration. The Commission should not now be permitted to obtain review upon a more extensive record.

5. The Granting of a Stay by the Court Below Does Not Present a Proper Issue for Review.

The granting of the stay of which the Commission complains lay with the discretion of the Court below. *Scripps-Howard Radio v. Federal Communications Commission,* 316 U.S. 4, 10-11.

In granting the stay, and in subsequently refusing to modify it, the Court below acted unanimously. The Commission's application to Chief Justice Vinson for a modification of the stay pending the presentation of the instant petition for certiorari was denied by the Chief Justice, after oral argument in chambers, on November 26, 1947. These circumstances are themselves strong evidence that the case involves no abuse of discretion by the Court below.

The Commission argues that the action of the Court below was an interference with the jurisdiction of the Commission (Petition for Cert., pp. 20-21). But this argument ignores the fact that the Commission's action was itself an interference with the jurisdiction of the Reorganization Court. The Court below, being called upon to weigh the competing jurisdictions of the Reorganization Court and of the Commission, properly concluded that the Court should be permitted to continue with the normal administration of the reorganization. Such a decision cannot be called an abuse of discretion.

The practical effect of the granting of the stay order was to preserve the status quo in the reorganization proceedings until the validity of the Commission's action might be fully examined. The Court below, after a preliminary examination of the case, concluded that the petition for review "has prima facie merit". (R. 230 a). It was faced with at least the possibility (we submit, the certainty) that the Commission's action would ultimately be set aside. In such a context it acted conservatively in preserving the status quo of the reorganization proceeding until the Commission's action had been finally tested on its merits.

6. The Stay Order of the Court Below Should Not Be Modified or Set Aside Pending Disposition of the Case by This Court.

As we have pointed out, Chief Justice Vinson denied the Commission's motion for a modification of the stay entered by the Court below pending the presentation of the instant petition for certiorari. We submit that the action of the Chief Justice was correct and should not be reversed. We note, but do not argue, the question whether the full Court could grant a stay after it had been refused by a single Justice. It is significant, however, that the power to grant such stays is confined by Section 350 of the Judicial Code to "a justice of the Supreme Court". It may well be argued that the denial of a stay by a single Justice renders the matter *res adjudicata*.

Even if this Court were to grant the instant petition for certiorari, it should not set aside or modify the stay, pending its review of the case. We have already suggested that the action of the Court below cannot be

characterized as an abuse of discretion. But, in any event, this Court should not reach a contrary conclusion in advance of its assuming jurisdiction and hearing complete argument on the point.

The effect of the stay entered by the Court below was merely to preserve the normal status of the reorganization proceeding of Pittsburgh Railways Company. On the other hand, the Commission's action, in taking the action now under review in the Court below, had sought to change the status quo by injecting certain limitations upon the jurisdiction of the Reorganization Court. The Commission now asks this Court, in effect, to stay a stay. It asks for a double negative, of which the end result would be positive; namely, to change the normal procedure of the Reorganization Court. A stay, we submit, should not be entered by this Court in these circumstances.

Even more important is the fact that hearings on a plan of reorganization have actually been commenced in the Reorganization Court (Petition for Cert., p. 10, n. 7). If this Court were now to set aside or modify the stay entered by the Court below, the effect of its action would be to inject new problems into those pending hearings and possibly to cause them to be terminated.

We also point out that the Commission's request for a modification of the stay of the Court below (Petition for Cert., p. 22) is couched in extremely vague and general terms. This Court would assume a heavy burden in undertaking, in a highly unusual fact situation, to mold or modify a stay in advance of a consideration of the whole case.

Insofar as the Commission may seek to modify the stay so as to permit joint hearings before the Reorganization Court and the Commission, we point out (in addition to the fact that the Reorganization Court has already undertaken hearings without the joinder of the Commission) that the Counsel for the Commission has heretofore advised the Reorganization Court that the Commission's experience in the only case where such concurrent hearings have been held "was such that it would not recommend that procedure again in any other reorganization". (R. 241 a, 247 a, 251 a).

CONCLUSION.

For the foregoing reasons, the prayer of the petition for certiorari should be denied.

Respectfully submitted,

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